United States Court of Appeals

for the Second Circuit

APPENDIX

76-1487

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 76 - 1486

UNITED STATES OF AMERICA,

Appellee,

- against -

WALLACE JARVIS,

Defendant-Appellant.

APPENDIX OF APPELLANT

Guy L. Heinemann
Attorney for
Defendant-Appellant
410 Park Avenue
New York, N.Y.10022
(212) 753-1400

PAGINATION AS IN ORIGINAL COPY

76 CR 253-2

0715 | 207 | 1

~~DOE, - JOHN~~ WALLACE JARVIS

FRAIL, J. 76 253 2

U.S. TITLE SECTION	OFFENSES CHARGED	COUNTS
18-2113(a)(d) & 2	Bank robbery and use of a dangerous weapon	2
18:2113(a)	Bank Robbery	1
18:2113(d)	Bank Robbery and use of a dangerous weapon	1

Bail: $ 50,000 — X Pers. Recog.

II. KEY DATES & INTERVALS

Indictment XX — Information 4-8-76; Superseding X 4-22-76

Arraignment: ~~4/15/76~~ — 6/14/76 X; 7/19/76

Trial: 7/14/76 — 7/20/76

Sentence: 9/24/76

6/3/76

U.S. Attorney or Asst.: Jonathan Marks

ATTORNEYS — Defense X CJA

~~Alfred Wachtel~~
50 Court St.
Brooklyn, N.Y.
11201 875-3737
relieved

BLANCHARD 1

DATE	PROCEEDINGS
4-8-76	Before BRAMWELL, J - Indictment filed -Bench Warrant Ordered/Issued.
4-15-76	Before WEINSTEIN J - case called - deft reported a fugitive - trial set for 4-26-76
4/20/76	Before WEINSTEIN,J.- Case called- deft and counsel present- deft arraigned and enters a plea of not guilty- bail set at $50,000.00 P.R. Bond to be secured by all property deft has interest in- trial set for 5/4/76 at 10:00 A.M.
4/22/76	By WEINSTEIN,J.- Order appointing counsel filed
4-22-76	Before BRAMWELL, J - SUPERSEDING INDICTMENT FILED.
4/23/76	Before WEINSTEIN,J.- Case called- deft and counsel not present- gov application for bench warrant granted- bail temporarily revoked counsel to be here at 5:30 P.M.
4/23/76	Before WEINSTEIN,J.- Case called- deft and counsel present- case adj 4/26/76 at 4:00 P.M.- deft to remain incarcerated until that time

DATE	IV PROCEEDINGS (continued) PAGE TWO (DOCUMENT NO.)	V. EXCLUDABLE DELAY
4/26/76	Before WEINSTEIN,J.- Case called- deft and counsel present - bail hearing ordered and begun- hearing concluded- bail revoked- case set for trial on 5/4/76 at 9:30 A.M.- On motion of A.U.S.A. Marks the underlying indictment is dismissed.	
4/27/76	Petition for writ of habeas corpus ad testificandum filed- issued	
4/30/76	Stenographers Transcript (2) dated 4/26/76 filed	
4/30/76	Voucher for expert services filed(court reporter)	
5-4-76	Before WEINSTEIN J - case called - deft & atty Alfred Wachtel present - defts application to discharge his attorney is granted - deft to obtain his own attorney -Mr. Wachtel relieved - Wade hearing is set for May 11, 1976 at 9:30am.	
5-6-76	Voucher for compensation of atty filed.	
5-11-76	Before WEINSTEIN J - case called - deft & atty present - defts motion for bail argued and granted - bail is set at $100,000 secured by $10,000 cash - deft waives his speedy trial right - The Govt is ready to proceed to trial today - trial set for May 18, 1976 at 10:00 am.	
5-19-76	Before WEINSTEIN J - case called - deft & counsel present - Mr. Heinemann is assigned as counsel - submit Order - defts motion to dismiss the indictment is denied - pre trial conference held and concluded - case adjd without date.	
5/21/76	Before WEINSTEIN,J- Case called- deft and counsel present-bail set at $100,000.00 secured by his 2 pieces of real estate plus the real estate of his aunt-case to be transferred to Judge Pratt	
5-24-76	Notice of readiness for trial filed	
6/3/76	BEFORE PLATT,J.-SUPERSEDING INDICTMENT FILED	
6-8-76	By PRATT, J - Authorization for Expert Services of Investigator John McNalley filed.	
6-14-76	Before PRATT, J - case called - deft & counsel Guy Heinemann present - deft arraigned and after being advised of his rights and on his own behalf enters a plea of not guilty to the superseding Information - bail contd - adjd to 7-19-76 for trial - defts motion for Discovery etc - motion argued - motion granted in part.	
6-24-76	Affidavit of GUY L. HEINEMANN filed. and defts Memorandum of Law in support of motion for Discovery filed.	
7/12/76	Petition for writ of Habeas Corpus Ad Testificandum filed and issued.	
7-19-76	Before PRATT, J - case called - deft & counsel present - trial resumed - Govt rests - defts motion to dismiss - motion argued & denied. trial contd to 7-20-76.	

RECEIPT NUMBER	CD NUMBER	DATE	RECEIPT NUMBER	CD NUMBER

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET U. S. vs

WALLACE JARVIS - 2

76 | 253 | 2
Yr. | Docket No. | Def.

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
7/13/76	Before PRATT, J. - Deft & Counsel present. Hearing ordered & begun. Hearing to continue on 7.14.76 at 10:00 a.m.				
7/13/76	Petition for Writ of Habeas Corpus Ad Testificandum issued & filed.				
7-14-76	Before PRATT, J - case called - deft & counsel Guy Heinemann present - Wade -Simmons hearing contd and concluded - Miranda hearing held and concluded - trial ordered and BEGUN- Jurors selected and sworn - trial contd to July 15, 1976 at 10:30 am.				
7/15/76	Before PRATT, J. - Deft & Counsel present. Trial resumed- Defts motion to suppress, etc. Motions denied. Trial to continue on 7/16/76 at 10:00 a.m.				
7-16-76	Before PRATT, J - case called - deft & counsel present - trial resumed - trial contd to 7-19-76.				
7-20-76	Before PRATT, J - case called - deft & counsel present - trial resumed - deft rests - Govt rests - deft sums up - Govt rebuttal sums up - Judge charges Jury at 2:00 PM - alt. discharged - Jury returns from its deliberations and renders a verdict of guilty as to counts 1 and 2 - bail contd - post trial motions to be heard on day of sentence - sentence adjd without date - Order of sustenance filed and signed.				
7/22/76	76 M 1057 filed in Criminal file.				
8-19-76	Defts Memorandum of Law filed				
9/24/76	Before PRATT, J.- Case called. Deft &Counsel present. Deft renews his motion to set aside verdict. Motion denied. Deft sentenced to imprisonment for a total period of 5 years, on counts 1 and 2 of the indictment. The Court appoints Guy Heinermann to represent the deft on appeal and the court orders that the deft can appeal in forma pauperis. Bail contd. pending appeal. As Mr. Jarvis business set as additional bail.				
9/24/76	Judgament & Commitment filed. Certified copies to Marshals.				
9/28/76	Voucher for compensation for expert services filed.				
10-6-76	Notice of appeal filed (no fee)				
10-4-76	Docket entries and duplicate of notice mailed to the court of appeals				
10-12-76	Stenographers transcript filed dated July 16, 1976.				
10-21-76	Stenographers transcript filed dated May 19, 1976.				
10-26-76	Voucher for expert services filed				
10-26-76	Two transcripts filed (one dated July 14 and July 15,1976) and one dated July 19 and July 20, 1976.				
11-1-76	Stenographer's Transcript dated May 21, 1976 - Filed.				
11-1-76	Stenographers transcript dated May 4, 1976 filed				
11-3-76	Order received that the record be docketed on or before 12-1-76. Filed.				

UNITED STATES DISTRICT COURT
CRIMINAL DOCKET

DATE	PROCEEDINGS (continued) (Document No.)	V. EXCLUDABLE DELAY (a)	(b)	(c)	(d)
11/5/76	Stenographers transcripts dated 7/13/76, 7/14/76, and 7/14/76 filed.				
11/5/76	Voucher for compensation for expert services filed.				
11-5-76	2 transcripts filed one dated Apr,. 20 and April 23, 1976 filed.				
11/10/76	Voucher for compensation for expert services filed.				
11/10/76	Stenographers transcript dated 9/24/76 filed.				

AO 257 Interval Start Date Lit. Rule

RP:JM:eh
. 4701,554

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

WALLACE JARVIS,

Defendant.

- X

Weinstein D

SUPERSEDING
INDICTMENT

76 CR 253(S-1)
(T. 18, U.S.C. §2113(a)
& (d) and §2)

76CR253(S)

THE GRAND JURY CHARGES:

COUNT ONE

On or about the 2nd day of February, within the Eastern District of New York, the defendant WALLACE JARVIS knowingly and wilfully, by force, violence, and intimidation, did take from the person and presence of employees of the European-American Bank, 31-21 Thompson Avenue, Long Island City, Queens, New York, approximately Four Thousand Seven Hundred Nineteen Dollars ($4,719.00) in United States currency in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation. (Title 18, United States Code, Sections 2113(a) and 2).

COUNT TWO

On or about the 2nd day of February 1976, within the Eastern District of New York, the defendant WALLACE JARVIS did knowingly and wilfully, by force, violence, and intimidation, take from the person and presence of employees of the European-American Bank, 31-21 Thompson Avenue, Long Island City, Queens, New York, approximately Four Thousand Seven Hundred Nineteen Dollars ($4,719.00) in United States currency in the care, custody, control, management and possession of the said bank, the deposits of which bank were then and there insured by the Federal Deposit Insurance Corporation and in commission of this act and offense the defendant WALLACE JARVIS did assault and place in jeopardy the lives of the said bank employees, as well as the lives of other persons present, by the use of a dangerous weapon. (Title 18, United States Code, Sections 2113(d) and 2).

A TRUE BILL.

_____
FOREMAN.

_____
DAVID G. TRAGER
UNITED STATES ATTORNEY
EASTERN DISTRICT OF NEW YORK

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JULY 15, 1976

THE COURT: Gentlemen, yesterday we concluded about a day and a half of hearings on the defendant's motion to suppress certain evidence which may be offered in this case.

The motions seem to break into three parts. First, requested suppression on the grounds that the arrest itself was illegal. That claim is based upon the fact we are dealing here with a John Doe warrant which doesn't on its face describe the identity of John Doe. The defendant argues we may not use extrinsic evidence for purposes of supplementing the warrant itself, that the warrant therefore violates the appropriate rule of the Federal Rules of Criminal Procedure, is invalid and that everything that flows from the warrant must be suppressed. He includes in what should be suppressed, mug shot which was taken, fingerprints which were taken, the defendant's presence at the lineup and any other statements made by the defendant.

The motion based upon illegality of arrest is denied. I cannot accept the argument that extrinsic evidence may not be used in

conjunction with the warrant. Logic compels the conclusion that no piece of paper may identify either a person or place. Extrinsic evidence is always necessary. If you pass the purely formal level of analysis to get the underlying purpose of a warrant, the Fourth Amendments prohibition against unreasonable searches and seizures, you find that in the circumstances here we have a warrant which within the operation of the Government, that is the U. S. Attorney's office, the F.B.I., the Grand Jury, the warrant is clearly and historically here tied to the indictment itself It charges a specific crime. It is a crime committed by two individuals, one of whom was identified as John Doe rather than as Wallace Jarvis for the reason the name of the individual was not known. In order to take the charged defendant into custody it was necessary, as it always is necessary, to relate the words of the warrant to the body which is to be seized. That, as I said, requires extrinsic evidence. There's no question here but that the extrinsic evidence which was available was sufficient, proper, clear identification of the defendant as the person

sought in the warrant. Therefore, the face of the warrant itself, I find it was a valid warrant for purposes of this arrest under these circumstances.

The argument is made -- technically they do not have to reach it -- but the argument has been made and for the record so that it will be clear in the event of any appeal which might be taken, that if the warrant is invalid then the arrest here must be held to be illegal because the Constitutional requirement for arrest in a private home must override the authority given to the F.B.I. under 18 U. S. Code 3052, to arrest based on probable cause. Under the circumstances here, the defendant -- we will forget what the defendant might concede. He needs to concede nothing. But the probable cause is clear. The only question remaining being the one left open in United States against Watson where the Supreme Court indicated they were not in that case deciding whether or not a search of a private home under the statutory authority granted would have to be invalidated by the Constitutional provision. Were I to be called upon to decide that question, I would decide the question that the statutory

authority is sufficient to authorize this arrest based on the circumstances which face the F.B.I. It would be authorized under the U. S. Code. So much for the first aspect of the suppression.

As to the second, the defendant seeks to suppress three statements which he is claimed to have made. One that he knew Blanchurd; second, that he didn't know Bowman and third the front door is to the left. Near the end of the motion with respect to the third statement as to the front door being to the left in one of the photographs was withdrawn. With respect to the other two statements, I note in passing, there is other evidence concerning his knowledge of Blanchurd and that the statement that he does not know Bowman is a false one by the defendant's own testimony. Neither of those circumstances weighs in my decision to deny this motion. I have heard the testimony, particularly that of Agent Wichner and of the defendant and I find credible the testimony that the defendant was read his rights three times in the course of the arrest of the booking process which extended over a period of approximately one hour. I find there is no undue delay in the

processing of the defendant up to the time he appeared before the magistrate. There is no evidence of coercion, no threats of bodily harm. There's not even a claim of a forced confession or overbearing of his will. On the contrary, the defendant's own testimony shows he demonstrated a remarkable composure self-control and resistance to the Government's questioning both before and after the alleged statements concerning Blanchurd and Mr. Bowman.

The motion under the Miranda portion of the hearing is also denied.

As to the third portion, the motion to suppress the identification testimony of two eyewitnesses, Di Giacomo and Morales, both of these witnesses identified the defendant at the lineup. We have been told both of them will testify at the trial. Di Giacomo also identified the defendant in a photo spread. Morales did not, although given an opportunity to do so she was able to pick out the defendant from the photo spread. The motion in this respect is denied in all respects. The case law dictates each fact situation must be viewed by itself. The basic test is whether the

procedures used in the precourtroom identification procedures were impermissibly suggestive. I find under the circumstances here that the procedures were not impermissibly suggestive. Weighing the various factors involved, it appears both witnesses had a good opportunity to observe the defendant at the bank. They both were in a position to have paid close attention to him. They dealt with him while he was there. Neither one panicked. They helped him to get the money he was demanding.

As to the prior descriptions of the witness -- I'm sorry. As to the prior descriptions given by the witnesses of the defendant on the record thus far before me they are not too clear in either case. I do not find, however, as the first point was not extensively developed in the testimony, but particularly with the case of Morales who seemed somewhat uncertain as to what description she had given of the robber behind the counter shortly after the event, when the time came when she saw him in person she seemed certain of her identification. The argument of impermissibly suggestive techniques

being used by the Government falls particularly with respect to Miss Morales since she looked at a photo spread involving Mr. Bowman and said he most likely resembled the defendant of the five or six photographs which were in front of her.

While she was not able to pick out the defendant from the photo spread in April which was given to him the 22nd, I believe it was, she said in substance something clicked when she saw him in person in the same lineup when Mr. Bowman was there. She clearly distinguished between Mr. Bowman and Mr. Jarvis. Had there been suggestive techniques used, one would expect her to have found Mr. Bowman, to pick him out of the lineup rather than Mr. Jarvis. Both of the witnesses were certain of the identifications which they made on the first occasion when they made them.

One of the witnesses repeated more than once, I forget whether it was Di Giacomo or Morales, used the term positive. I believe it was Mr. Di Giacomo.

Finally, the time lapse between the event and the time of the out-of-court identifications, a matter of approximately eleven weeks, I find that

is not an inordinate delay under the circumstances here and does not in my view render the identification made unreliable or under the circumstances of the manner in which the lineup and the photo spreads were handled does it contribute toward making them impermissibly suggestive. Both witnesses testified they had been given no suggestions as to who the right man was. No gestures were made. No instructions were given. I find that testimony to be credible.

The defendant has argued the statements or indications of agreement by Mr. Wichner after the correct identifications were made must necessarily render the entire proceedings invalid because those statements alone constitute impermissibly suggestive material. I do not agree under the circumstances as they were described on the witness stand. I do not believe and I find it is not the case that the identifications made by either witness was influenced by whatever indications Mr. Wichner may have given after the identifications were made; that they agreed what I believe he described as his professional opinion who the robber behind the counter was. Neither of

the two individuals in question here, Di Giacomo or Morales, appeared to be suggestible-type people.

end #1

Di Giacomo was particularly positive in his identification, was clear in his testimony that when he picked the defendant out of the photo spread on April 22nd, he did it based upon his memory of what he saw in the bank February 2nd and he was equally positive when he picked the defendant out of the lineup it was also based on his direct memory of the February 2nd events. I find his testimony to be credible on that point.

Miss Morales, far from being suggestible, was quite an independent person. She thought Bowman most resembled the defendant. She was not told immediately thereafter that the Government disagreed with her, but immediately when she saw the defendant in the same lineup with Bowman she quickly picked out the defendant. She had no hesitation or doubt about it.

In short, I find there is nothing in the circumstances which were developed before me to show improper suggestion to either of the witnesses or any indication of influence on either witnesses' identification as a result of the procedures used.

In short, all three motions are denied. The motion made by the defendant to strike as irrelevant the testimony of the defendant that he had been to the bank before, that motion is granted. I have placed no reliance on that testimony in arriving at the decision on the following three motions. Those are my rulings, gentlemen. Are we ready to proceed with opening statements.

MR. MARKS: I am ready, your Honor. There are two points I'd like to make. First, your Honor referred to an arraignment beforethe magistrate. I think that was based on a statement I made yesterday which was incorrect. The magistrate didn't arraign the defendant. He was arraigned before Judge Weinstein.

THE COURT: Thank you for correcting that.

MR. MARKS: I've had Karen Klegg call Washington and she's talked to somebody at the Treasury Department who said he's been able to find the check and was about to put it in the mail. I've had my secretary call to ask them to send a photocopy so Mr. Heinemann can have the check.

THE COURT: That's rather remarkable service.

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 76-1487

UNITED STATES OF AMERICA,

Plaintiff-Appellee

against

WALLACE JARVIS,

Defendant-Appellant.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 235 East 50th Street, New York, New York 10022

That on January 20, *19* 77 *deponent served the annexed* Appendix to Brief for Appellant

on David D. Trager, Esq.
attorney(s) for United States Attorney for Appellee, United States of America
in this action at 225 Cadman Plaza East, Brooklyn, New York 11201
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me January 20, 1977

Randy N. Eisenpress

RANDY N. EISENPRESS
Notary Public, State of New York
No. 31-4601682
Qualified in New York County
Term Expires March 30, 1978

Judy Weiss

The name signed must be printed beneath
JUDY WEISS

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

DOLORES M. BYRD being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 9th day of August 1977 he served a copy of the within

PETITION FOR REHEARING

by placing the same in a properly postpaid franked envelope addressed to:

GUY L. HEINEMANN, ESQ.

410 PARK AVENUE

NEW YORK, NEW YORK 10022

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Dolores M. Byrd

Sworn to before me this

9th day of August 1977

Carolyn N. Johnson

NOTARY PUBLIC

Qualified in Queens County
Term Expires March 30, 1979